United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7373

ORIGINAL

To be argued by
IRVING L. WEINBERGER

In The

United States Court of Appeals

For The Second Circuit

JODY A. MILLER and JOSEPH MILLER,

Plaintiffs-Appellants,

vs.

WALTER ZAJAC,

Defendant-Appellee.

BRIEF FOR PLAINTIFFS-APPELLANTS

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FOR THE SECOND CIRCUIT

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JODY A. MILLER and JOSEPH MILLER, :

Plaintiffs-Appellants :

-against- :

WALTER ZAJAC, :

Defendant-Appellee. :

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BRIEF FOR PLAINTIFFS-APPELLANTS

Statement

In this diversity action, the infant plaintiff Jody A. Miller sued for personal injuries sustained while riding as a passenger in the defendant's automobile. In a second cause of action, Joseph Miller sued for loss of services and medical expenses.

After trial before Judge Milton Pollack and a jury, a verdict was brought in as follows (JA 323-1):

> "Your Honor, we the jury find in favor of the defendant Walter Zajac. We find no negligence on his part".

The father's claim for loss of services, as pleaded in the second cause of action, was dismissed by the Court at the close of plaintiff's case (JA 217). The ground for dismissal was that the amount recoverable was below the $10,000 sum requred to sustain jurisdiction.

After the judgment had been filed, the

infant plaintiff moved on June 12, 1975 for an order which would direct that the trial minutes should be corrected so as to reflect that plaintiff's attorney made a specific request for a charge which was not included in the Court's instructions to the jury (JA 341). The trial judge denied said motion, after noting that the request had been made, and that the instruction had not been included in the charge. (JA 349-350). Annexed to the Court's decision was an extract from the trial minutes showing that plaintiff's attorney did not except to the charge on the ground that said instruction was lacking; nor did he renew his request therefor (JA 351-352).

THE FACTS RELATING TO THE ACCIDENT

The plaintiff Jody testified that in August, 1972, she was a guest in a camp near Ellenville in Sullivan County (JA 20). She was then 17 years old, having been born on November 23, 1955 (JA 19). The defendant testified that he was also a guest at said camp (JA 219).

On August 31, 1972, both Jody and the defendant attended a dance at another resort in the area (JA 22,222). At about 10:00 P.M., a group of eight people left the dance in order to visit a club where another guest of the camp was performing as a guitar player (JA 25).

Three passenger rode in defendant's car: the plaintiff Jody sitting beside the driver, and a boy and girl in the

back seat (JA 26). The defendant testified that his vehicle was a 1972 two-door Toyata which he had purchased new (JA 219). He stated that the car was in good operating condition; and the brakes and steering mechanism operated well (JA 223). The car was equipped with seat belts and shoulder harness, also in good condition (JA 220-221).

The plaintiff Jody testified that the weather was clear and the stars were out (JA 26). She stated that she did not notice the seat belt when she entered the car (JA 27, 76). Nor did she see the shoulder harness (JA 77). Said plaintiff admitted that she was familiar with such equipment and knew that it was installed to protect the passenger (JA 78). But she rarely used a seat belt (JA 78).

Defendant drove to the club along a highway. They arrived without incident. They remained at the club for a short while and then left (JA 28-30). Defendant testified that they left because the cover charge was too expensive and some members of their party were under age (JA 226).

At about 11:30 P.M. defendant headed his vehicle back to the dance which they had left earlier. Plaintiff testified that she did not notice that any of their party had been drinking. She also testified that she did not see the seat belt upon re-entering defendant's car (JA 30-31).

On the return trip, the defendant travelled for a while along the same road, which was a highway type of road (JA 31).

He then made a right turn into a 2-lane road which plaintiff described as a curvy mountain road, having a paved black surface. The road was surrounded by fields; there were no houses (JA 32-33).

The accident occurred less than a half hour from the time they had left the club (JA 34). Plaintiff testified that when the car went around a curve, she heard the wheels screech and she swayed a lot (JA 35). Natalie, the girl in the back seat, told the driver to slow down; he was going too fast (JA 35). A few minutes later they came to another curve. This time the car went off the road. According to plaintiff, "Walter went off the road and we went skidding into a pole, head-on". (JA 36).

Plaintiff was unable to state how far the car travelled after it left the road. The front of the car came in contact with the pole, head-on. The impact was heavy. The car came to a hard fast stop. Upon leaving the road she heard defendant say "Oh my God, we're going to crash" (JA 36-37).

On cross-examination plaintiff stated that up until the time she heard screeching of the wheels and felt the swaying, defendant had been driving fine. The screeching and swaying occurred just before the accident (JA 80-82).

When the car struck the pole, the plaintiff Jody was thrown from her seat onto the floor. The boy in the back seat came forward and pushed Jody's seat against her. She was thus pinned between the seat and the floor (JA 37-38).

Said accident caused the plaintiff Jody to suffer a serious back injury. However, since the jury never went beyond

the question of liability, the physical consequences of the accident will not be considered in this brief.

DEFENDANT'S EXPLANATION OF THE ACCIDENT

The police officer who interviewed defendant on the night of the accident testified that defendant stated that he had swerved to avoid hitting a deer on the road (JA 276).

Approximately a year after the accident, on July 19, 1973, defendant filed an Accident Report (JA 269, Pltf. Exhibit 19, JA 327). On the second page of said Report, the item in the right hand column of the middle of the page (No. 17) asked the defendant to check the box indicating the action of the vehicle before the accident. He checked the box which stated: "11. Skidding" (JA 328). The defendant answered Item 18 "Description and Apparent Cause of Accident" as follows (JA 328):

> "Came to curve in road under minimal lighting conditions. Unknown moving object, believed to be an animal, darted in front of vehicle. To avoid hitting, swerved to the left and off the road onto grass, where began uncontrolled skid due to wet grass, and hit telephone pole."

Defendant's trial testimony radically contradicted two of the statements in said Report with respect to (a) skidding and (b) that the animal darted in front of the vehicle.

Defendant testified that on the return trip he left the highway and made a right turn into a side road which was a 2-lane

level road with an asphalt surface (JA 227-228). He then proceeded for about a half a mile when the accident happened. He negotiated one curve in the road. At the second curve the accident occurred (JA 228).

As he approached the second curve defendant stated that he was moving at the rate of 40 miles per hour. There was no warning sign indicating rate of speed or sharp turn, or caution. The road was very poorly lit (JA 229).

Defendant testified that as he approached the curve, he saw an animal standing there and he tried to avoid it. The animal came into view on the right hand side of the road just as the vehicle entered the curve. It appeared like a deer. When defendant first saw the animal, the car was 50 or 60 feet away from it (JA 229-231).

On direct examination, defendant stated that he pulled over to the left in order to by-pass the animal, to go around it. Also he applied the brakes and the car swerved to the left. It continued to move to the left hand side of the road. It then went off the road onto gravel, and then onto the grass. The car travelled a distance of 40 feet from the point where defendant first applied brakes to the point where he left the road. The grass was wet; it seemed to have dew (JA 231-232).

After leaving the road, defendant tried to steer back on, but the car did not respond completely. As he was travelling on the grass, defendant continued to apply his brakes. Neverthe-

less, the vehicle continued to move forward. The left front end of the car then came into contact with the telephone pole (JA 232-233).

Defendant's testimony was that he applied the brakes immediately upon observing the animal 50 to 60 feet away (JA 231); and he continued to apply brakes after he left the road, indeed up until the very point where he hit the pole (JA 241). The effect of so applying brakes, however, was only to reduce the speed from the initial rate of 40 miles per hour to a rate of 20, or possibly 15 (JA 242).

On cross-examination, defendant testified to the distance he travelled after observing the animal. The car was then 50 or 60 feet away (JA 252-253). Defendant immediately applied brakes, but travelled 50 feet to the point where he went off the road (JA 254-255).

Defendant crossed the gravel shoulder, 2 or 3 feet wide; and then proceeded onto the grass (JA 257). From the point where he left the road until he reached the pole, the distance was 60 feet (JA 261). The total distance travelled, from the moment the animal appeared, was 100 to 120 feet.

The police officer measured said distance by studying the tire marks and he estimated that the car travelled 120 feet to the point where it hit the pole (JA 277).

Defendant seriously contradicted himself in respect of his initial observation of the animal. His Accident Report

stated that the animal darted in front of the vehicle (JA 328). At his examination before trial, defendant also stated that it darted out on the roadway (JA 250). But, in direct testimony at the trial, he stated that the animal was just standing there on the right hand side of the road (JA 230). On cross-examination the defendant retracted his prior statement that the animal had darted out, and he insisted that it was just standing on the road (JA 250).

Another serious contradiction had to do with the question of whether the car went into a skid. Defendant testified that as he travelled 50 or 60 feet, while still on the road, the car did not skid (JA 256). He testified further that the car did not skid when he travelled on the grassy area (JA 259). He was then confronted with the fact that his Accident Report mentioned a skid in two places, where he answered Items 17 and 18 (JA 259, 328).

The Accident Report stated: "began uncontrolled skid due to wet grass" (JA 328). Defendant explained said statement as follows (JA 260):

> "I did not skid. When I got onto the grass, when I was driving, when I was pulling the car to the right, I could feel that it wasn't going where I wanted it to go. That is what I meant by uncontrolled skid, is when I pulled the car to the right, she was not reacting."

Defendant drove in the grassy area for a distance of 50 to 60 feet. He stated that the car was not turning

to the right even though he was attempting to steer it. His speed at the moment of impact was allegedly 15 to 20 miles per hour. Nevertheless, the vehicle itself sustained serious damage. The bumper was damaged on the left-hand side and was slightly out on the right. The hood jumped out of its locked position. The left front wheel was deflated and was moved into the car (JA 240-241). The vehicle had to be towed away from the scene (JA 277). The cost of repair was stated at $2,000 (JA 327).

POINT I

THE CHARGE DID NOT PROPERLY INSTRUCT THE JURY WITH RESPECT TO THE NEW YORK RULE OF NEGLIGENCE APPLICABLE TO THIS ACCIDENT.

The trial judge stated at the beginning of his charge that New York law would be applied, just as if the case were being tried in a state court (JA 307). But the trial judge did not properly instruct the jury on the issue of negligence in circumstances where a car leaves the road and strikes a pole or a tree. The proper charge on said issue is the instruction set forth in New York Pattern Jury Instructions, Vol I, Second Ed., 1974, Sec. 2:84 A, as follows:

> "The fact that defendant's motor vehicle left the road and struck a telephone pole is a circumstance to be taken into consideration in determining whether defendant exercised reasonable care in its operation. It permits, but standing alone,

> does not require you to find defendant negligent. If, taking into consideration all of the facts and circumstances existing at the time of the incident, including the condition of the road, the condition of the weather and the speed at which defendant was operating his vehicle you find that defendant's car left the road as a result of his failure to use reasonable care, your finding will be that he was negligent. If you find that the car did not leave the road as a result of defendant's failure to exercise reasonable care, your finding will be that he was not negligent."

The footnote applicable to said instruction cites Pfaffenbach v. White Plains Express Corp., 17 N.Y. 2d 132. Said landmark decision set aside the prior rule of law that there could be no inference of additional negligence, such as the failure to keep a lookout, or to maintain control, based on the mere fact that the car left the road (Galbraith v. Busch, 267 N.Y. 230; Cole v. Swaglen, 30 N.Y. 325). Under prior law, proof of a sudden swerving out of lane, or off the road, with nothing more, was held not to constitute prima facie evidence of negligence (Lo Piccolo v. Knight of Rest Products Corp., 7 A.D. 2d 369, 183 N.Y.S. 2d 301, aff'd 9 N.Y. 2d 662). Said rules were changed by the decision in Pfaffenbach 17 N.Y. 2d 132, 136, which stated:

> "Thus there should be more legal flexibility on what is negligence as applied to the control of moving vehicles and the question left open to factual judgments of the jury

> where the record shows a skid, or the explanation for a skid, or a car on the wrong side of the road, or the explanation of why it is there, or the need for the passenger in a car to react in relation to its operation."

In Pfaffenbach, the New York Court of Appeals sustained a verdict for the plaintiff where the defendant failed to come forward with an explanation for having crossed over from the southbound lane into the northbound lane.

In the instant case the plaintiff was deprived of the benefit of the Pfaffenbach rule for two reasons. The charge failed to instruct the jury that it could infer negligence from the mere fact that the car left the road and hit a pole (Coury v. Safe Auto Sales, Inc., 32 N.Y. 2d 162, 164. In Simmons v. Stiles, 43 A.D. 2d 417, 353 N.Y.S. 2d 257, 259, the Court stated:

> "Of course, it is not required that the jury infer negligence from the mere happening of the accident- and plaintiff's request recognized this - but it is necessary for the jury to be informed that they have the power to do so without relying upon other facts."

The charge was erroneous from the additional reason that it failed to instruct the jury that once a prima facie case of negligence has been established, the burden shifts to the defendant to go forward with proof which may explain that the accident resulted from conditions over which he had no control. (Simmons v. Stiles, 43 A.D. 2d 417, 353 N.Y.S. 2d 257, 259). The failure to so charge requires a reversal because the plaintiff

has been deprived thereby of the full benefit of the Pfaffenbach rule (Warrick v. Oliver, 38 A.D. 2d 664, 327 N.Y.S. 2d 219. See also: Listengart v. Ell, 30 A.D. 2d 586, 291 N.Y.S. 2d 271 Bennett v. Edward, 239 App. Div. 157, 267 N.Y.S. 417).

The probative value of such explanation is for the jury. In Livacari v. Zafonte, 367 N.Y.S. 2d 808, 812, the Court stated:

> "In this case, if the jury did not accept the defendant's story that she lost control because she was hit in the rear by an automobile - which of course it had the right to do - then the only proof left in the record establishes that the car veered from its normal path, hit a tree and was facing in the opposite direction from which it had been proceeding. Upon these remaining facts the jury was warranted in drawing the inference that the defendant had been negligent in the operation of her motor vehicle."

In Montgomery v. Humphrey, 284 App. Div. 365, 132 N.Y.S. 2d 448, 449, the Court stated:

> "Where it can reasonably be found that the driver permitted the vehicle to move in a direction of danger which he could have seen, controlled and prevented, the question must be left to the jury to find one way or the other."

See also: Spreen v. McCann, 264 N.Y. 546.

None of the elements of the New York law of negligence applicable to the circumstances of this case were submitted to the jury. In denying plaintiff's post-judgment motion,

Judge Pollack stated that his charge did not include specifically the matter contained in the P.J.I, charge embodying the rule in the Pfaffenbach decision (JA 349).

Far from informing the jury that the defendant had the duty of going forward with an explanation for the accident, the Court's charge stated that it was not even necessary for the defendant in this case to prove or disprove anything with respect to plaintiff's claim, except with regard to the seat belt issue (JA 309).

Instead of instructing the jury that an inference of negeligence could be made from the mere fact that the car left the road and hit a pole, the trial judge relied upon general instructions that the driver must maintain a reasonably safe rate of speed, must have his vehicle under reasonable control, and must use reasonable care to avoid an accident (JA 310).

Having so instructed on the rule of negligence, the trial judge immediately thereafter gave an instruction on the rule applicable to acts performed in an emergency, which was quite incomplete and most favorable to the defendant.

POINT II

THE CHARGE DID NOT PROPERLY INSTRUCT THE JURY AS TO THE RULE APPLICABLE TO CONDUCT OF A DRIVER IN AN EMERGENCY SITUATION.

The Court's charge with respect to conduct in an emergency situation included the following elements (JA 311-312):

1. A defendant is not charged with negligence if he acts as a reasonably prudent person would in the same emergency situation. He is not charged with negligence when he is faced with an emergency and he acts without opportunity for deliberation.

2. Mere error of judgment or wrong choice of action is not negligence. A person is faced with an emergency when he is confronted by a sudden and unforseen condition not brought about, or contributed to, by his own negligence.

3. The jury will find negligence if it determines that the condition was not sudden and should have been forseen; that it was not created or contributed to by defendant's own negligence; and that he did not act as a reasonably prudent person would have acted in the same circumstances.

The charge on the issue of conduct in an emergency was entirely too general and was not connected to the factual circumstances of the case. The Court virtually directed the jury to find that an emergency situation did exist; and that its sole function was to determine whether the defendant had acted properly in such situation. Under the Court's instruction, the jury was empowered to conclude that the defendant was not negligent, provided only that he acted as a reasonably prudent person would have in like circumstances.

The plaintiff was seriously prejudiced by the failure of the trial judge to relate the rule governing conduct in an emergency to the specific facts of this case. The defendant took

the position that the accident was caused by an emergency situation which arose at the moment he spotted an animal in the road. The night of the accident the defendant informed the police officer that he had swerved to avoid a deer (JA 276).

The trial judge charged the jury as to emergency without first evaluating the evidence so as to determine as a matter of law whether the emergency rule truly applied to this accident.

The physical evidence, as testified to by defendant, was that he observed the animal 50 to 60 feet ahead, at which time he was doing 40 miles per hour. He applied brakes, which apparently reduced his speed somewhat. After travelling 50 to 60 feet, he went off the road and proceeded along the grass. Still applying brakes, he travelled an additional 50 or 60 feet, at which time he struck the pole. His speed at that juncture was 20 miles per hour, possibly 15. No explanation was provided as to why defendant did not steer away from the pole; or, if unable to control the steering, why he did not bring the car to a stop before the impact. Defendant insisted at the trial that at no time did his vehicle go into a skid, neither on the paved surface, nor in the grassy area.

The record contains physical evidence as to the speed of the vehicle at the moment of impact which seriously contradicts defendant's testimony, namely, the damage sustained by the vehicle; its tire marks extending for 120 feet; and the fact that the car had to be towed away from the scene.

The defendant succeeded in convincing the trial judge that the issue was whether the appearance of the animal produced an emergency which should excuse the defendant from all liability. The record establishes that said alleged emergency ended when defendant left the road without striking the animal. Thereupon, a new peril came into being, namely the telephone pole standing 50 to 60 feet ahead, which defendant failed to avoid striking, either by steering away from it or by bringing the car to a stop.

The mere contention that the accident was caused by an emergency does not justify a submission of such defense when the physical evidence contradicts it. In Demme v. Elmer J. Fogerty, Inc., 366 N.Y.S. 2d 51, 53, the Court stated:

> "The trial court erred in charging the jury as to the standard of care applicable in an 'emergency situation' since there were no facts presented at the trial upon which a jury could properly find that defendant ** was responding to an emergency situation."

Whatever emergency there was that caused the defendant to swerve, and to go off the road, had terminated when he entered the grassy area. The following rule is stated in 38 American Jurisprudence, Negligence, at page 687:

> "Before one can absolve himself from liability for injury caused by acting upon emergency to save himself from harm, he must show not only that an emergency existed which was brought about by no negligent act of his own but also that the resultant injury could not have been prevented after the peril to him had ceased."

A proper evaluation of the physical evidence established as a matter of law that the presence of the animal in the road was not the proximate cause of striking the pole. In Middlebrook v. Auletta, 15 N.Y. 2d 501, the Court of Appeals reversed the Appellate Division determination in favor of the defendant (reported at 20 A.D. 2d 705, 247 N.Y.S. 2d 391).

The facts, as stated in the Appellate Division Decision, are that the defendant in Middlebrook left the road and hit a tree, causing injury to his guest. Defendant testified that he had been driving carefully prior to the accident. An alleged emergency arose when plaintiff spotted a dog in the road 100 feet ahead and cautioned the driver to slow down. The driver waited until he was 20 feet away from the animal. He then cut his wheel and went into a slide. The Appellant Division determined that said facts were insufficient to create an inference of negligence. The basis of its ruling was that where an emergency is not created by the acts of the defendant, he is not obliged to exercise the best judgment.

The dissent of Justice McNally made a more careful analysis of the physical evidence. Upon being warned of the dog in the road, defendant proceeded 80 feet and then applied brakes. The car struck a tree 250 feet from the point where the plaintiff first observed the animal. The dissent cited two cases which were distinguished on the ground that the evidence there established that the defendant had responded without delay to the emergency situation. The defendant failed to do so in Middlebrook or

indeed in the instant case. In reversing, the Court of Appeals held that the plaintiff had made out a prima facie case of negligence.

In La Grande v. Abbott, 266 App. Div. 507, 42 N.Y.S. 2d 535, the Court stated:

> "The charge in effect said that defendant's testimony that he did not see the approaching car until just before the accident was a complete answer to the claim of negligence. This eliminated from the consideration of the jury the testimony that the approaching car was plainly visible for a half mile and that he did nothing to avoid the collision."

Manifestly, the defendant's negligence contributed to the accident, thereby rendering the emergency rule inapplicable. While the Court's charge did state that the defendant may not be absolved from liability, under the emergency rule, if his negligence contributed to the accident, the charge on said issue failed to alert the jury to the physical evidence establishing such negligence.

In Kinsfather v. Gruenberg, 365 N.Y.S. 2d 903, 906, the Court stated:

> "In seeking refuge in the emergency doctrine, as he does here on appeal, Gruenberg overlooks the fact that the doctrine is bottomed upon the idea that the situation suddenly and unexpectedly confronted must not be of his own making, nor can he have contributed to its making. It seems obvious that the jury rejected this doctrine and on the record they were justified in

finding that his speed under the conditions prevailing did contribute to the making of the situation he encountered. Whether his action under the circumstances was unreasonable and a concurrent cause of the accident was a proper jury question."

POINT III

THE CHARGE ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE WAS ERRONEOUS AND HIGHLY PREJUDICIAL TO PLAINTIFF.

The charge referred to contributory negligence on five occasions (JA 308, 310, 312, 313, 316). At the conclusion of the charge plaintiff's attorney requested the Court to charge that there was no evidence in the case that plaintiff was contributorily negligent (JA 347). The Court did not grant such request.

In Willis v. Young Men's Christian Assn., 28 N.Y. 2d 375, 378, the Court stated:

"It is the general rule that contributory negligence should not be charged if there is no or insufficient evidence to support it (65 A C.J.S. Negligence, sec. 293, p. 1032). Where plaintiff is in fact free from contributory negligence, it is not error to refuse to instruct and submit to the jury on this subject."

In Korbel v. Garrido, 26 A.D. 2d 571, 271 N.Y.S. 2d 152, the Court stated:

"In our opinion, the court's repeated instructions to the jury that,

> in order to recover, plaintiffs were required to establish, inter alia, their freedom from contributory negligence, and, the Court's refusal to charge that, as a matter of law, plaintiffs were free of contributory negligence, constituted prejudicial error requiring a new trial."

See also: Hargraves v. Agway Petroleum Corporation, 368 N.Y.S. 2d 354; Meyer v. Brown-Harter Cadillac, Inc., 32 A.D. 2d 1045, 303 N.Y.S. 2d 746).

The only evidence that relates even remotely to negligent conduct on the part of the plaintiff Jody is her testimony with respect to speed, screeching of the wheels and swaying when the car went around the first curve.

Defendant testified that when he turned off the highway into the 2-lane road, the distance from that point to the point of the accident was only one-half of a mile (JA 228). Traversing said distance, he encountered two curves (JA 228) Jody testified that when the car went around the first of them, she heard the wheels screech, and she felt the car swaying (JA 35). It was then that the girl in the rear seat asked the driver to slow down (JA 35). A few minutes later, when they entered the second curve, the accident occurred (JA 36). Up until that time the defendant had been driving fine (JA 82).

Despite his excessive repetition of the issue of Jody's negligence, the trial judge correctly stated the rule that a passenger is entitled to assume that the driver will exercise reason-

able care and will comply with the Vehicle and Traffic Law until she has knowledge of acts indicating that the driver will not do so (JA 312).

There is a further rule that a passenger is under no legal duty to remind the driver to be careful in negotiating a turn. The passenger has a right to assume that the turn will be performed without accident (Siegel v. Schwartz, 195 N.Y.S. 2d 746; Rossi v. Maccarato, 286 App. Div. 940, 142 N.Y.S. 2d 805).

In Reilly v. Rawleigh, 245 App. Div. 190, 281 N.Y.S. 366, the Courtnoted the rule that where a guest apprehends danger, he must protest to the driver. If the driver fails to heed his complaint, the guest must insist that the driver stop the car and let him out. In spite of such rule, the Court held that when the driver is apparently a careful operator, the passenger may entrust himwith the operation; the guest need not watch the spped-ometer and take heed of every movement. Indeed, even if the car is being driven around a curve faster than it should be, the guest is not negligent in failing to protest, when they are travelling along an empty country road.

In this case, plaintiff was not required to give advice to the driver when he entered the second curve, just prior to the accident. The law recognizes that it may be quite dangerous for the passenger to give unsolicited advice in a perilous situation(Pfaffenbach v. White Plains Express Co., 17 N.Y. 2d 132, Reich v. Evans, 7 A.D. 2d 765, 180 N.Y.S. 2d 159).

POINT IV

THE CHARGE ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE WAS RENDERED MORE ONEROUS BY REASON OF DEFENDANT'S IMPRESSIVE EXPERT TESTIMONY ON THE SEAT BELT ISSUE.

The testimony of Prof. Barzelay, a safety engineer ostensibly made a deep impression on the jury (JA 280). Its effect on plaintiff's case was not mitigated by the correct charge which the trial court gave on that issue (JA 319-320). The jury was properly instructed that if it found that, had plaintiff used the seat belt and shoulder harness, she would not have received some or all of her injuries, then she is not entitled to any award for injuries received by reason of her failure to use such equipment (JA 319-320). (Spier v. Barker, 35 N.Y. 2d 444).

It was relatively simple for the jury to misinterpret such instruction and to consider the plaintiff's failure to utilize the safety equipment as evidence of contributory negligence. Indeed plaintiff's attorney was fearful that the jury would fall into just such error, particularly in view of the inordinate emphasis given to the issue of contributory negligence in the total charge. Accordingly, he excepted to the seat belt instruction; and requested a specific direction, in view of said issue in the case, that the plaintiff was not guilty of contributory negligence (JA 322).

The trial judge would have afforded to plaintiff the protection she needed if he had granted Request #10 of defendant's Requests to Charge (JA 15). Said request asked for the instruction appearing in P.J.I. 2:87 and the Commentary at pge 256. In connection with the seat belt issue, the jury is to be instructed to fix the total charges for the plaintiff. Said sum is then to be diminished by the amount of damage attributable to the plaintiff's failure to use the seat belt as follows:

> "If you find that some of plaintiff's damages would not have been sustained if (he, she) had been wearing a seat belt, write in here the amount indicated in number one which you find to be the amount of such damages $_____."

Such instruction would have clarified for the jury that failure to wear the seat belt could result only in a diminution in the amount of damages recoverable, and not in a finding that the plaintiff was guilty of contributory negligence.

POINT V

THE GENERAL CHARGE WAS SO INADEQUATE AS TO PREVENT FAIR CONSIDERATION OF THE EVIDENCE BY THE JURY.

The charge delivered by Judge Pollack was a general charge which failed to connect the legal principles to facts in the case. In the Court's view there was no need to analyze and review the evidence (JA 313-314). In Green v. Downs, 27 N.Y. 2d 205 208, the Court stated:

> "The error was compounded by a complete lack of specificity in the overall charge; and, in particular, by the failure to discuss the evidence and to relate to it the principles of law that were charged, and to apply to each party's version the pertinent statutory and decisional law. We deem it essential that a charge incorporate the factual contentions of the parties in respect of the legal principles charged."

See also: Kroemer v. Raybestos Manhattan, Inc., 247 App. Div. 105, 286 N.Y.S. 207; Shlisky v. Clancy, 4 A.D. 2d 944, 168 N.Y.S. 2d 327; Walsh v. Wilkie, 2d A.D. 2d 634, 246 N.Y.S. 2d 279; U.S. Vitamin & Pharm. Corp. v. Capital Cold Store Co., 21 A.D. 2d 661, 249 N.Y.S. 2d 725; Greelish v. New York Central Railroad Company, 29 A.D. 2d 159, 286 N.Y.S. 2d 61; Shapiro v. Art Craft Strauss Sign Co., 39 A.D. 2d 696, 332 N.Y.S. 2d 588; Ferrara v. Sheraton McAlphin Hotel Corporation, 311 F 2d 294 (2 CIR. 1962).

POINT VI

THE INTEREST OF JUSTICE REQUIRES THAT THIS COURT SHOULD REVIEW THE COMPLETE CHARGE IN SPITE OF THE FACT THAT COUNSEL MAY HAVE FAILED TO EXCEPT TO PORTIONS THEREOF.

Rule 51 of the Federal Rules of Civil Procedure provides for requests to charge. Under said Rule, the Court is required to inform counsel of its proposed action thereon prior to summation. The rule further provides that the failure to give a particular instruction may not be assigned as error unless objection is taken before the jury retires.

In spite of the firm provision in the Rule that unless exception is taken, the point has not been preserved for appeal, appellate courts do review the charge where it contains fundamental error (Cohen v. Franchard Corporation, 478 F. 2d 115, Cert. Den. 414 U.S. 857 (2 CIR. 1973); Blier v. United States Lines Company, 286 F 2d 920, Cert. Den. 368 U.S. 839 (2 CIR. 1961). Discretionary power exists in the appellate court to review, of its own motion, errors not saved by proper objection (Troupe v. Chicago D & C Bay Transit Co., 234 F. 2d 253 (2 CIR. 1956); Thompson v. Laskas Motor Lines, Inc., 274 F. 2d 205 (2 CIR. 1960).

With respect to the issue of defendant's conduct in an emergency situation (discussed in Point II hereof) no exception was taken. Appellant submits that the Court should utilize its discretionary power to correct fundamental error. In Estes v. Town of Big Flats, Chemung County, 41 A.D. 2d 681, 340 N.Y.S. 2d 950, the Court reversed where the evidence was insufficient to entitle a party to a charge of the emergency rule.

In respect of the charge on the issue of negligence under the Pfaffenbach decision (discussed in Point I hereof) appellant's attorney did request a Pfaffenbach charge prior to summation and submission. Request was communicated to the trial judge's secretary via telephone as Judge Pollack had directed (JA 343-344; 349). The trial minutes reflect that said request was not renewed after the charge was delivered which failed to incorporate same (JA 352).

It should be noted that just before counsel summed up Judge Pollack stated the following (JA 304).

> "The requests to charge substantially as submitted will be included in the charge itself, both sides having taken their respective requests from the pattern jury instructions, with which I am not in disagreement. I am not sure that it will come out in the exact words, but the substance I think is all there."

In Cohen v. Franchard Corporation, 478 F 2d 115, Cert. Den. 414 U.S. 857 (2 CIR. 1973) the court held that the charge contained fundamental error and that reversal was necessary to prevent a miscarriage of justice. The decision held further that there was no need for the appellant to except after the charge, where the Court had been fully informed of his position in advance, and where further efforts to persuade the Court would have been futile.

See also: Steinhauser v. Hertz Corporation, 421 F 2d 1169 (2 CIR. 1970); Meagher v. Long Island Railroad Company, 27 N.Y. 2d 39).

In Ferrara v. Sheraton McAlpin Hotel Corporation, 311 F. 2d 294 (2CIR. 1962), the Court held the charge inadequate because "it left the applicable rule of law in a state of uncertainty *** and deprived the jury of the minimum guidelines for responsible decision." Reversal was directed in order to prevent a miscarriage of justice. The Court held that it had power to review the charge in spite of the provision in Rule 51. The

Court stated (p. 298):

> "But we must also remain cognizant of the responsibility of an appellant court to insure that trial court judgments have been rendered in conformity with applicable rules of law. When the integrity of a trial court's judgment has been called into question by a substantial departure from those rules, an appellate court cannot put aside this responsibility merely because of the inadvertence of appellant's counsel at trial."

In Simmons v. Stiles, 43 A.D. 2d 417, 353 N.Y.S. 2nd 257, the plaintiff's attorney requested a charge embodying the Pfaffenbach rule. This was denied on the ground that the rule did not apply. The Appellate Division reversed, holding as follows (353 N.Y.S. 2d at page 259):

> "There is no merit to defendant's contention that plaintiff failed to preserve his right to appeal on this issue. The record establishes that plaintiff's request to charge was made in compliance with CPLR 4017. *** In any event, since the trial court's failure to charge as requested was 'fundamental error', reversal is required in the interest of justice."

See also: U.S. Vitamin & Pharm. Corp. v. Cold Star Co., 21 A.D. 2d 661, 249 N.Y.S. 2d 725; Hartley v. Szadkowski, 32 A.D. 2d 550, 300 N.Y.S. 2d 82; Shapiro v. Art Craft Sign Corp., 39 A.D. 2d 696, 332 N.Y.S. 2d 588; Bender v. Supermarkets General Corporation, 370 N.Y.S. 2d 184.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND A NEW TRIAL SHOULD BE DIRECTED.

Respectfully Submitted,

MARK B. WIESER
Attorney for Plaintiffs-
Appellants

IRVIN [illegible]. WEINBERGER,
Of Counsel

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JODY A. MILLER et ano.,

Plaintiffs-Appellants,

against

WALTER ZAJAC,

Defendant-Appellee,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 310 W. 146th St., New York, N. Y.

That on the **29th** *day of* **September** *19* **75** *at* **27 William Street, N.Y., N.Y.**

deponent served the annexed Brief *upon*

Eugene H. Lieber of Counsel to George S. Evans

the **Attorneys** *in this action by delivering* 2 *true copy* ss *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **29th**
day of **September** *19* **75**

James A. Steele

Print name beneath signature

JAMES A. STEELE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977